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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947

No. 794

VAIL MANUFACTURING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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VAIL MANUFACTURING COMPANY,
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vs.

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Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Your petitioner, Vail Manufacturing Company, an Illinois corporation, respectfully represents and shows to this Honorable Court that it seeks a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Seventh Circuit, denying your Petitioner's Motion for Leave to File Its Motion to Modify and Amend The Court's Decree Entered January 25, 1947, granting a petition for enforcement of an order of the National Labor Relations Board.

Statement of Matter Involved

The respondent, National Labor Relations Board, issued its decision and order dated March 31, 1945 (R. 9-19), and

upon petitioner's not complying therewith, respondent filed its petition for enforcement of the order with the Circuit Court of Appeals for the Seventh Circuit (R. 1-7).

The said court filed its opinion and decision granting the petition and affirming the board's order (R. 212-216). Following denial of petition for rehearing, the court of appeals entered its decree of January 25, 1947, enforcing the order of the board (R. 218-222).

On April 22, 1947, petitioner filed its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and the cause was docketed in the Supreme Court of the United States as cause No. 1280.

On June 2, 1947, this Court denied petitioner's petition for a writ of certiorari and petitioner subsequently filed its petition for a rehearing of cause No. 1280 on June 26, 1947.

On June 23, 1947, and while the petition for rehearing was pending in this court, the Congress of the United States, over a presidential veto, enacted into law the Labor Management Relations Act, 1947, which amongst other things, amended and modified the National Labor Relations Act of July 5, 1935, by divesting the National Labor Relations Board of all jurisdiction over the parties and the cause here involved.

On November 17, 1947, motion for leave to file a supplemental petition for rehearing was granted by this Court, but the petition for rehearing was denied.

Petitioner filed its "Motion For Leave To File Respondent's Motion To Modify And Amend The Decree Entered January 25, 1947" (R. 225-227), with the Circuit Court of Appeals for the Seventh Circuit, and said motion for leave to file was denied by that court on February 10, 1948 (R. 230).

The Facts

On the assumption that the employer in discharging two foremen, Joseph Mastik and Frank Mastik, violated rights guaranteed to them under Sections 8(1) and 8(3) of the National Labor Relations Act, the court below ordered reinstatement of the said employees with back pay. The review here sought is of the final judgment of the court of appeals as it relates to reinstatement with back pay of the aforesaid employees.

Although petitioner contended before the board that said employees were machine operators who were eligible to participate in union activities covering non-supervisory employees, the board found that they were in fact foremen and therefore not eligible to participate in said election (R. 11). The board also ruled against petitioner's contention that said employees did not quit petitioner's employment but were discharged for their refusal to be classified by petitioner as non-supervisory employees in order to swell the anti-union vote (R. 51-53, 125-126). Petitioner renewed its contention before the court of appeals, but the said court affirmed the board's finding and ordered reinstatement of said employees with back pay.

The law under which the decree of the court below dated January 25, 1947, was rendered was amended by enactment of the Labor Management Relations Act, 1947, which divested the National Labor Relations Board of all jurisdiction over foremen and supervisory employees (Appendix to Brief).

The petitioner was not granted an opportunity to have the merits of this cause determined under the law as it was amended because the court of appeals denied petitioner's motion for leave to file its motion to modify and amend the decree dated January 25, 1947.

Reasons Relied On for the Allowance of the Writ

1. The United States Circuit Court of Appeals for the Seventh Circuit "has decided an important question of federal law which has not been, but should be, settled by this court" (Sup. Ct. Rule 38 (5) (b)).

2. The final judgment of the court of appeals denying petitioner's "Motion For Leave To File Respondent's Motion To Modify And Amend The Decree Entered January 25, 1947", is in conflict with the decision of the Circuit Court of Appeals for the District of Columbia in *L. A. Young Spring and Wire Corp.* v. *National Labor Relations Board,* decided September 29, 1947, reported in 163 F. 2d 905, and which determined that supervisors were not subject to the jurisdiction of the National Labor Relations Board following enactment of the Labor Management Relations Act of 1947.

3. The court of appeals committed error in denying petitioner's motion in that it thereby denied petitioner its lawful right to have the issues and the merits of the cause considered under the amended provisions of the Labor Management Relations Act, 1947.

4. The court of appeals committed error in denying petitioner's motions because the Labor Management Relations Act, 1947, must be held to supersede the pre-existing decree of the court dated January 25, 1947, relative to the supervisors.

5. The court of appeals committed error in failing to give effect to the recognized doctrine that where jurisdiction of a tribunal is divested by statute, the court shall dismiss for want of jurisdiction.

6. The court of appeals erred by refusing to withdraw or modify and amend its injunctive order as it applied to

the supervisors so as to conform it to the requirements of the amended act.

7. The court of appeals committed error by permitting its decree of January 25, 1947, to remain in effect, thereby requiring petitioner to perform a useless formality no longer authorized or sanctioned by law.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court for its review and determination, a full and complete transcript of the record and of the proceedings in the cause entered on its docket as No. 9107 entitled *National Labor Relations Board, Petitioner,* v. *Vail Manufacturing Company, Respondent,* and that the final judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reviewed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court shall seem just.

Respectfully submitted,

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Dated May 5, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947

No. 794

VAIL MANUFACTURING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion and Final Judgment of Court Below

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit dated January 2, 1947, is printed in the record (R. 212-216) and is reported in 158 F. 2d 664. The decree of the court of appeals dated January 25, 1947, is printed in the record (R. 218-222). The final judgment of the court of appeals denying "Motion for Leave to File Respondent's Motion to Modify and Amend the Decree Entered January 25, 1947", is printed in the record (R. 230).

II

Statement of Jurisdiction

Review is sought of the final judgment of the Circuit Court of Appeals for the Seventh Circuit entered February 10, 1948 (R. 230). Jurisdiction of this Court is invoked under Section 10(e) of the Management Labor Relations Act, 1947, and under Section 240 of the Judicial Code, as amended. (United States Code, Title 28, Section 347).

III

Statement of Case

A full statement of the case is set forth in the petition.

IV

Specification of Errors

The United States Circuit Court of Appeals for the Seventh Circuit erred in:

1. Denying Petitioner's Motion for Leave to File Motion to Modify and Amend the Decree Entered January 25, 1947, by said Court, when the law under which said decree was rendered had been amended and changed by enactment of the Labor Management Relations Act, 1947, which divested the National Labor Relations Board and the court of appeals of all jurisdiction over supervisors.

2. Refusing to give effect to the amended act which superseded the pre-existing decree dated January 25, 1947, and final judgment dated February 10, 1948, relative to these supervisors.

3. Refusing to withdraw or modify and amend the injunctive order and final judgment and to conform it to the requirements of the amended act.

4. Lending itself as an instrument through which petitioner is required to perform a useless formality no longer authorized or sanctioned by law.

V

ARGUMENT

Point A

The Law under Which the Decree of the Court of Appeals Was Rendered Had Been Changed and Amended by the Enactment of the Labor Management Relations Act, 1947, and Divested the National Labor Relations Board and the Court of Appeals of All Jurisdiction Over Supervisors.

On June 23, 1947, and while petitioner's petition for rehearing for writ of certiorari was pending in this Court, the Congress of the United States enacted into law the Labor Management Relations Act, 1947, which amended the National Labor Relations Act of July 5, 1935, by excluding foremen and supervisory personnel from participating in the benefits and protection afforded under the Act.

The specific provisions of the act upon which petitioner relies are Section 2 (3), (11), and Sections 8(a)(1), (3) and 10(c) (Appendix to Brief).

These sections specifically set forth the intention of the Congress to exclude foremen and supervisory personnel from the protection and benefits under the Act, by restrictively defining the term "employees" against whom an employer may commit an unfair labor practice, thereby depriving the National Labor Relations Board of all jurisdiction over the parties and the cause here involved.[1]

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[1] During congressional debate in the Senate, Senator Flanders remarked: "Mr. President, I have not heard at any time in the discussion of this bill what seems to me an adequate explanation of the reasons for removing

Point B

When Jurisdiction of a Tribunal Is Divested by Statute, the Court Shall Dismiss for Want of Jurisdiction

The time honored rule recognized and enforced by this Court as well as other Federal courts of appellate jurisdiction is: the court must dismiss a proceeding regardless of whether it has gone to a higher court when a right created by statute has been abolished by a subsequent act of Congress.

Under such circumstances, it is the duty of the court in disposing of a matter to apply the law as it now exists. Since its decision in the case of *United States* v. *Schooner Peggy*, 1 Cranch 103, 110, an unbroken line of decisions emanating from this Court support this doctrine:

Western Union Tel. Co. v. *Louisville & Nashville Railroad Co.*, 258 U. S. 13;

Gwin v. *United States*, 184 U. S. 669, 674;

Baltimore & Potomac Railroad Co. v. *Grant*, 98 U. S. 476;

United States v. *Tynen*, 11 Wall. 88;

Norris v. *Crocker*, 13 How. 429;

State of Maryland v. *Baltimore & Ohio Railroad Co.*, 3 How. 534;

Dinsmore v. *Southern Express Co.*, 183 U. S. 115.

---

this supervisory force from the area of collective bargaining. The reasons are simple and direct. Unless the employer can hire and discharge, promote, demote, and transfer these men, he has lost the control of his business. He cannot run it effectively. If he cannot run it effectively and efficiently, he cannot continue in business profitably. If he cannot operate profitably, he is a bad manager, not only from the stockholders' standpoint, but also from that of the working force as well. Only the profitable business can furnish sustained employment at good wages. At this point the interests of stockholders and employees are identical."—Congressional Record, Vol. 93, page 4804, Proceedings and Debates of the 80th Congress, First Session, May 7, 1947.

In considering the application of the Labor Management Relations Act, 1947, as it relates to the status of supervisors, the court in *L. A. Young Spring & Wire Corp.* v. *National Labor Relations Board* (C. C. A., District of Columbia), September 29, 1947, 63 F. 2d 905, held that since the statute must be applied in its amended form, the court had no alternative but to set aside the order of the Board, which, if allowed to stand, would operate *in futuro* in a manner contrary to the amended statute.

The Court stated at Pages 906-907:

> ". . . It is now unmistakably clear, however, that the 80th Congress intended to deny, and has denied, the benefits of the Act to 'supervisors' ".
>
> "In these circumstances, it is the duty of this Court in disposing of this matter to apply the law as it now exists." See authorities cited therein, page 907.

Thus the rule for which petitioner contends is especially applicable to a proceeding such as this one, in which the relief granted operates *in futuro*. In cases in which an injunction is sought, the courts apply the law prevailing at the time of the disposition of the question on appeal, and not the law which prevailed at the time the decree appealed from was rendered.

Texas Company v. *Brown*, 258 U. S. 466, 474;

Duplex Printing Press Co. v. *Deering*, 254 U. S. 443, 464;

American Steel Foundries v. *Tri-City Central Trades Council*, 257 U. S. 184, 201.

This Court has recognized the inherent power of the Circuit Courts of Appeals to modify, vacate or grant other relief in cases pending in the courts at the time that the Labor Management Relations Act, 1947, was enacted into law. Following this rule, this Court refused jurisdiction of this cause by denying petitioner's petition for rehear-

ing for a writ of certiorari. This Court further emphasized the rule by refusing to modify or amend its own mandate issued prior to passage of the amended act in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, No. 418, November 17, 1947, 92 L. Ed. 119 (Advance Sheets), by remanding the case to the court of appeals for further proceedings in accordance with the provisions of the amended act.

The procedure followed by this Court in the above cases is full authority for the doctrine that it is the duty of the lower courts to reconsider their decrees entered prior to the enactment of the Labor Management Relations Act, 1947, in the light of the changes made in the law.

POINT C

The Amended Act Must Be Held to Supersede the Pre-existing Judgment of the Court of Appeals Relative to These Supervisors.

As pointed out in the authorities cited under petitioner's Point E herein, orders of the National Labor Relations Board, in cases such as this, are designed to enforce or protect public as distinguished from private rights. However, it has much longer been recognized that the injunctive decree of a Federal court intended to give effect to or enforce a public right, is superseded by a subsequent act of Congress which defines or limits the public right in a manner inconsistent with the court's decree.

The leading case on this point is *Pennsylvania* v. *The Wheeling & Belmont Bridge Co.*, 59 U. S. (18 How.) 421. In that case, this Court declared that a bridge across the Ohio River was a public nuisance and granted an injunction commanding its abatement. Before the injunction had been obeyed or given effect, an act of Congress declared the

bridge a lawful structure. In subsequent proceedings, the court held that insofar as it secured public rights, the injunction had been wholly superseded by the Act of Congress. Mr. Justice Nelson there said:

> ". . . But that part of the decree directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. . . ."
>
> "Upon the whole, . . . our conclusion is, that, so far as respects that portion of the decree which directs the alteration or abatement of the bridge, it cannot be carried into execution since the Act of Congress which regulates the navigation of the Ohio River, consistent with the existence and continuance of the bridge; and that this part of the motion, in behalf of the plaintiff, must be denied. . . ."
>
> "The motion for the attachment is denied, and the injunction dissolved."

Point D

The Injunctive Order as It Applies to the Supervisors Should Either Be Withdrawn or Modified and Amended to Conform to the Requirements of the Amended Act.

In a case such as this, where Congress by law establishes public rights, the duty of the court is that of interpreting and executing the will and intent of the Congress.

As a result, if the congressional purpose and policy is changed or is clarified, the courts are required, and they

have been accustomed, to modify and amend accordingly their decisions and decrees in pending cases, and such of their decrees and orders in past cases, as remain in continuing effect and which operate *in futuro:*

Duplex Printing Press Co. v. *Deering,* 254 U. S. 443;
American Steel Foundries v. *Tri-City Council,* 257 U. S. 184;
Texas Co. v. *Brown,* 258 U. S. 466;
U. S. v. *The Schooner Peggy,* 1 Cranch 103;
Dinsmore v. *Southern Express Co.,* 183 U. S. 115;
Rafferty v. *Smith, Bell & Co.,* 257 U. S. 226.

This practice of the Federal courts is an old application of the general rule that no equitable injunction is, in any literal sense, a "permanent" injunction. It is well recognized that every injunctive order must be adapted to the changing circumstances of fact and law.

This doctrine is succinctly stated in *United States* v. *Swift & Co.,* 286 U. S. 106, by Mr. Justice Cardozo as follows (pp. 114-115):

> "We are not doubtful of the power of the court of equity to modify an injunction in adaptation to changed conditions. . . . A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . The result is all one whether the decree has been entered after litigation or by consent." (Citing authorities.) "In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

The doctrine is likewise given effect in *Milkwagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, where it is stated at page 298:

> ". . . Familiar equity procedure assures opportunity for *modifying* or *vacating* an injunction when its

continuance is no longer warranted." (Emphasis supplied.)

It is submitted that the change in the law requires that the court of appeals modify and amend its decree so as to give effect to the law as it now exists.

Point E

The Court Will Not Lend Itself to Requiring a Useless Formality No Longer Authorized or Sanctioned by Law.

The enforcement of the Board's order and of the final judgment of the court of appeals means that petitioner would be required to (a) offer reinstatement to the two supervisors, Joseph Mastik and Frank Mastik; (b) make them whole as to any loss in pay; (c) post a notice in which it would say to all of its employees that it would do the foregoing.

To require such action of petitioner is a useless formality, which because of the changes in the law, no longer is authorized or sanctioned.

If petitioner reinstated the foremen and discharged them immediately thereafter, there is no statute upon which the board could then proceed.

What if petitioner posted the notices required by the Board's order, but deleted the names of the Mastiks therefrom? In other words, had this action been brought after the law was changed, the court of appeals would be required to dismiss the proceedings for lack of jurisdiction over the supervisors.

As for the money to be paid to supervisors in the form of back pay, said payment was enforceable under the Na-

tional Labor Relations Act, 1935, only in the public interest. No private right was involved. See:

Virginia Electric & Power Co. v. *National Labor Relations Board,* 319 U. S. 533, 543;

Amalgamated Utility Workers v. *Consolidated Edison Co.,* 309 U. S. 261, 267, 269;

National Labor Relations Board v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 257;

Consolidated Edison Co. v. *National Labor Relations Board,* 305 U. S. 197, 236;

National Licorice Co. v. *National Labor Relations Board,* 309 U. S. 350, 362;

Agwilines, Inc. v. *National Labor Relations Board,* 5 Cir., 87 F. 2d 146, 150, 151.

The final judgment also requires petitioner to offer the Mastiks reinstatement as well as make them whole for loss of pay, but the power to command affirmative action is not punitive. *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7, 10, 12. *National Labor Relations Board* v. *Thompson Products, Inc.,* 6th Cir., 130 F. 2d 363, 367. Nor does the Act create any private right. *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 543; *Agwilines, Inc.* v. *National Labor Relations Board,* 87 F. 2d 146. The proceeding under the Act is not compensatory. *National Labor Relations Board* v. *Thompson Products, Inc.,* 130 F. 2d 363. Nor is there any other reason to remove and avoid the consequences of something which is not now guaranteed. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 236. No remedial objective would be accomplished by enforcing reinstatement and back pay.

Since supervisors are now no longer within the coverage of the National Labor Relations Act as amended, there is no public right remaining in the matter.

We therefore submit that the final judgment of the court of appeals is erroneous and should be reversed.

Respectfully submitted,

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Dated May 5, 1948.

APPENDIX

Pertinent Provisions of the Labor Management Relations Act, 1947

"Title I

Amendment of National Labor Relations Act

"Definitions

"Sec. 2. When used in this Act—

"(3) *The term 'employee'* shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but *shall not include* any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or *any individual employed as a supervisor*, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." (Italics supplied.)

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce *employees* in the exercise of the rights guaranteed in section 7;"

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

"Sec. 10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint *has engaged in or is engaging in any such unfair labor practice,* then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist *from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided,* That where an order directs reinstatement of an *employee,* back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him:" (Italics supplied.)

"Limitations

"Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

"Sec. 104. *The amendments made by this title shall take effect sixty days after the date of the enactment of this Act* . . ." (Italics supplied.)